

UNITED STATES OF AMERICA  
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT  
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of:

DOUGLAS DAGNER,

Respondent

HUDALJ 91-1589-DB (LDP)

Decided: October 28, 1991

Douglas Dagner, *pro se*

Geoffrey T. Roupas, Esquire  
For the Department

Before: THOMAS C. HEINZ  
Administrative Law Judge

**INITIAL DETERMINATION**

**Statement of the Case**

This proceeding arose pursuant to 24 C.F.R. Sec. 24.700 *et seq.* as a result of action taken by Thomas T. Feeney, the Manager of the Minneapolis-St. Paul, Minnesota, Office of the U.S. Department of Housing and Urban Development ("the Government," "the Department," or "HUD") on September 21, 1990, imposing a twelve-month Limited Denial of Participation ("LDP") upon Respondent. Pursuant to the LDP, Respondent was excluded immediately from participating as an approved appraiser in the Department's Direct Endorsement program within the state of Minnesota. The LDP was based on information indicating Respondent's appraisal work for the Department was not meeting the standards of the Department or of the industry. Thereafter, on October 19, 1990, as a result of new information developed during a conference between Respondent and Department officials, the period of the LDP was reduced to the six-month period ending March 21, 1991.

On October 25, 1990, Respondent appealed the imposition of the LDP and requested a hearing. After the parties filed responsive pleadings, a hearing was held in St. Paul, Minnesota, on May 14, 1991. The last brief was received July 19, 1991.

## **Findings of Fact**

1. Respondent is an individual residing in Annandale, Minnesota. From January 1986 until issuance of the LDP that is the subject of this proceeding, Respondent's sole occupation was appraising residential real property as a participant in HUD's so-called "Direct Endorsement Program." Tr. 36, 59-60.<sup>1</sup>

2. Virtually all of HUD's single-family mortgage insurance transactions involve the Direct Endorsement Program, wherein mortgagees approved and supervised by HUD do all of the loan processing, make the underwriting decisions, and endorse for insurance on behalf of HUD. Decisions to endorse for mortgage insurance rely in part upon information supplied in appraisal reports. Tr.35-37.

3. Appraisers approved by HUD may participate in the Direct Endorsement Program either on a fee-for-service basis or as employees of participating mortgagees. Tr.35-37. Respondent was a HUD-approved fee appraiser who received his fees upon submission of completed appraisal reports to mortgagees. Tr.59-60.

4. HUD Handbook 4150.1 REV-1 is entitled "Valuation Analysis for Home Mortgage Insurance." Gx.1. That handbook requires the appraiser to locate, photograph, and describe three recently sold residential properties comparable in value to the residence being evaluated for mortgage purposes. On or about July 19, 1990, Respondent submitted an appraisal report to a mortgagee for a property located at 1404 4th Avenue, Buffalo, Minnesota. Gx. 2. The report contained two significant errors. The address of comparable number 1 was given as "1205 5th Street South, Buffalo, Minnesota," but no such address in fact exists.<sup>2</sup> Tr. 12. Similarly, Respondent gave the address of comparable number 2 as "718 107h St N," Buffalo, Minnesota, but no such address exists. Tr. 13. Respondent mistakenly typed a "7" in place of the "t" in the address. The proper address should have been "718 10th St. N."

5. Ten percent of appraisals submitted to mortgagees by HUD-approved appraisers are reviewed by HUD staff in the field to determine whether they have been performed correctly. Tr. 36. On August 22, 1990, Ronald Butler, a staff appraiser for HUD, conducted a field review of Respondent's appraisal of the residence at 1404 4th Avenue South, Buffalo, Minnesota. Because Mr. Butler could not locate the reported residences

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<sup>1</sup>The following reference abbreviations are used in this decision: "Tr." for "Transcript"; and "Gx." for "Government's Exhibit."

<sup>2</sup>In his brief, Respondent asserts the street sign was so faded he "couldn't tell if it was 5th or 3rd," implying the correct address was "1205 3rd Street South."

of comparable value, he concluded that Respondent's valuation of the 4th Avenue South property was unsupported. On a scale of 1 to 5, where 1 and 2 are unacceptable ratings, both Mr. Butler and the Chief Appraiser, who subsequently reviewed Mr. Butler's review, rated Respondent's appraisal of this property in category 2. Tr. 13, 85; Gx.2.

6. On or about May 14, 1990, Respondent submitted an appraisal report for a residence located at 1500 Budd Avenue, Maple Plain, Minnesota. Gx.3. Respondent concedes that none of the photographs included with the report matched the properties identified as comparables by Respondent. Tr. 28; Brief, page 1.

7. More than three months later, on August 21, 1990, Joseph Menke, a staff appraiser for HUD, conducted a field review of Respondent's appraisal of the residence located at 1500 Budd Avenue, Maple Plain, Minnesota. Gx.3. Because the wrong photographs were submitted for the comparables (in addition to other problems with the report), Mr. Menke and the Chief Appraiser both rated this report in category 2.

8. On or about July 31, 1990, Respondent submitted an appraisal report for a residence located at 519 1st Avenue N.W., Buffalo, Minnesota. Gx.4. Each of the three properties used as comparables was misidentified: the photographs submitted for two of the comparables were not photographs of the properties located at the addresses given by Respondent, and the address submitted for the third comparable was inadequate to locate the property. Tr. 15. Respondent concedes he submitted incorrect photographs for two of the comparables. Brief, page 2.

9. On August 22, 1990, HUD's staff appraiser, Ronald Butler, conducted a field review of Respondent's appraisal of the residence located at 519 1st Avenue N.W., Buffalo, Minnesota. Gx.4. Mr. Butler concluded that this report should also be rated in the 2 category because it was impossible to verify the value of the misidentified comparables. The Chief Appraiser agreed with this rating.

10. Sometime during August of 1990, Respondent had surgery to replace a defective lens in one of his eyes. The lens had developed a cataract caused by medication prescribed in connection with an earlier kidney transplant. The lens in his other eye was also replaced in December of 1990 for the same reason. Respondent testified that the cataracts adversely affected his near vision but not his visual acuity at a distance. Tr. 61. After each lens replacement, his vision returned to normal in the repaired eye. Tr. 61, 73.

11. Respondent first learned that HUD had found defects in the appraisals he had submitted on May 14, 1990, July 19, 1990, and July 31, 1990, in the letter dated September 21, 1990, notifying him that he could not participate in the Department's Direct Endorsement Program as an approved appraiser for one year. Tr. 49, 68.

Respondent did not receive copies of the field review reports prepared on August 21 and August 22, 1990, in connection with his three defective appraisals until sometime after September 21, 1990. Tr. 67-69.<sup>3</sup> In other words, Respondent was not given any notice that his performance had been found defective, nor was he given an opportunity to improve his performance before he was removed from the rolls of HUD-approved appraisers.

12. There is no evidence that the errors in the appraisal reports submitted by Respondent have resulted in any actual damage to the Government to date. As of the date of the hearing, all of the mortgages apparently were current. Tr. 7-8.

### **Subsidiary Findings and Discussion**

An LDP is a type of debarment. The purpose of all debarments is to protect the public interest by precluding persons who are not "responsible" from conducting business with the federal Government. 24 C.F.R. Sec. 24.115(a). See also *Agan v. Pierce*, 576 F. Supp. 257, 261 (N.D. Ga. 1983); *Stanko Packing Co., Inc. v. Bergland*, 489 F. Supp. 947, 948-49 (D.D.C. 1980). The debarment process is not intended to punish; rather, it is designed to protect governmental interests not safeguarded by other laws. *Joseph Constr. Co. v. Veterans Admin.*, 595 F. Supp. 448, 454 (N.D. Ill. 1984). In other words, the purpose of debarment is remedial, not punitive. See 24 C.F.R. Sec. 24.115.

In the context of debarment proceedings, "responsibility" is a term of art that encompasses integrity, honesty, and the general ability to conduct business lawfully. See 24 C.F.R. Sec. 24.305; *Gonzalez v. Freeman*, 334 F.2d 570, 573 & n.4, 576-77 (D.C. Cir. 1964). Determining "responsibility" requires an assessment of the risk that the government likely would suffer injury by continuing to do business with a respondent. See *Shane Meat Co., Inc. v. U.S. Dep't of Defense*, 800 F.2d 334, 338 (3rd Cir.

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<sup>3</sup> There is some dispute in the record as to exactly when Respondent received his copies of the field reviews that form the basis for the Government's case. Ms. Frances Jane O'Neill, Deputy Director for Housing Development and Chief of the Single Family Branch in the Minneapolis-St. Paul HUD office, testified that they are normally sent out by regular mail within seven to ten days after they are turned in by the field reviewer. Tr.58. At hearing Respondent contended he did not receive them until six weeks to two months after he was dismissed. Tr.67. The letter notifying Respondent of the LDP is dated September 21, 1990. Although the three field reviews at issue in this case were completed a month earlier, on August 21 and 22, 1990, the September 21, 1990 letter acknowledges that Respondent may not have received his copies of the field reviews before receiving notice of the LDP. ("You have or will shortly receive the Appraisal Field Report (HUD 1038-V) for the cases that are the basis for this action.") Regardless of the precise dates on which Respondent received his copies of the field review reports, I believe Respondent's contention on brief that HUD imposed the LDP before Respondent received his copies of the field reviews.

1986). That assessment may be based on past acts. See *Agan*, 576 F. Supp. 257; *Delta Rocky Mountain Petroleum, Inc. v. U.S. Dep't of Defense*, 726 F. Supp. 278 (D. Colo. 1989). In the instant case, the issue is whether the errors Respondent made in the appraisals he performed in May and July of 1990 manifested a lack of "present responsibility" serious enough to debar him in September of 1990.

HUD's field review of a fee appraiser's report is to be conducted pursuant to Handbook 4150.1 REV-1 on form HUD-1038v. Section 9-7 of Handbook 4150.1 REV-1 states in part:

C. THE RATING OF THE APPRAISAL REPORT.

1) The Chief Appraiser (or designee) must review each field review report and rate the fee or DE staff appraiser using the 1-5 numerical rating system (see Appraisal Evaluation Matrix, Exhibit #4 at end of chapter). Each appraisal must be rated on its own merit, not on past performance of the appraiser. A "3" rating should be assigned if the appraiser has made errors and/or omissions, but such errors and/or omissions have a minimal effect on the final value. Errors and/or omissions which lead to value determinations which are an unacceptable underwriting risk to the Department should lead to "2 or 1" ratings. Any appraisal which indicates that the appraiser did not visit the subject property or the comparables, should result in a "1" rating. Any appraiser who is found to knowingly provide false information in an appraisal report should be removed from the panel by Limited Denial of Participation as set forth in HUD Handbook 4020.1 Rev-1.

2) After each review, the Chief Appraiser must send the original of the Form 1038v to the fee appraiser informing the appraiser of the results of the field review. Copy 2 of the form should be retained as a tickler to make sure the fee appraiser responds by the required date and may be destroyed upon receipt of original from the appraiser. The fee appraiser will be instructed on the form to come in for a personal meeting with the Chief Appraiser for a "2 or 1" rating. After three "2 or 1" ratings, the Chief Appraiser must:

- a. Institute short term (30-day) training, during which time the appraiser should be given only a limited number of cases that can be monitored closely; or,
  - b. Remove the individual from the Fee Appraiser Panel by LDP or other appropriate means.
- 3) Documentation of each fee appraiser's performance is important. Files must be updated regularly. Copies of all field review ratings along with a record of disciplinary meetings, training sessions, and phone calls must be documented in each fee appraiser's file. Without this documentation it is difficult to justify action against a problem fee appraiser.

### **The Department Did Not Have Cause to Impose an LDP upon Respondent**

Most of the defects in the appraisal reports at issue in this case concern misidentification of the residences listed as comparable values to the houses being evaluated for mortgage purposes. Respondent submitted either the wrong photographs or erroneous addresses. There are other kinds of defects in the reports, but the Appraisal Evaluation Matrix in Handbook 4150.1 REV-1 shows that the other defects did not have a significant effect on value determinations. It is therefore clear that HUD would not have found the reports unacceptable if Respondent had not made so many identification errors. Respondent believes the errors were caused by temporary vision problems surgically corrected in August and December of 1990. Whatever the cause, these types of errors are serious because they make it at best difficult for HUD to verify the market values the appraiser has assigned to the properties claimed to constitute comparable values to the mortgaged property. Tr.43-44.

Respondent submitted the first of the appraisals which are the subject of this proceeding on May 14, 1990. It was not until more than four months later, upon receipt of a letter dated September 21, 1990, that Respondent discovered that HUD officials had found it unacceptable. Meanwhile, he continued about his business, submitting appraisals to mortgagees under the false impression that his work was satisfactory. HUD is responsible for this false impression. If HUD had conducted a field review of Respondent's May 14 appraisal within 30 days as it did for the July 19 and July 31 appraisals, and if the results of the field review of the May 14 appraisal had been conveyed immediately to Respondent, he may never have made the errors found in the

July 19 and July 31 reports.<sup>4</sup> He testified that despite vision problems caused by cataracts, he thought he "was doing right." Tr.66. If he had known that he was not, as he put it, "doing right," he could have exercised greater care or he could have rejected any further assignments until his vision problems were corrected. He stopped accepting appraisal assignments when he felt he could not do them in 1989, the year he had pneumonia and a tracheotomy. Tr.66, 71.

Handbook 4150.1 REV-1 and testimony at the hearing demonstrate that an appraiser who knowingly provides false information in an appraisal report or who commits a fraud on the Government in connection with an appraisal is subject to immediate removal from the list of approved appraisers. Section 9-7 C. 1); Tr.46<sup>5</sup> This case clearly does not fall in that category; that is, there is no evidence that Respondent acted with intent to deceive. Nor was his performance so seriously substandard that the public interest demanded he be removed immediately from the rolls of HUD-approved fee appraisers without having an opportunity to improve his work or voluntarily refuse to accept appraisal assignments until he could perform them properly.

The Government relies on Handbook 4150.1 REV-1 in its argument that there was sufficient cause to impose an LDP upon Respondent without an opportunity to bring his work up to standard. Brief, page 9. According to the Government, the Handbook authorizes imposition of an LDP upon Respondent because three of his appraisals, when reviewed in the field, rated "2" on a scale of "1" to "5" where "5" is the best. However, Section 9-7 of Handbook 4150.1 REV-1 authorizes imposition of an LDP upon an appraiser with three unacceptable field review ratings only *after* the appraiser has been given notice of his defective performance and *after* he has failed to improve his work to acceptable levels in spite of notice and training. Section C. 2) quoted above says the

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<sup>4</sup>Section 9-4 of Handbook 4150.1 Rev-1 provides that field reviews should be done within 30 days of receipt of the appraisal report and accompanying documentation. In the words of the Handbook, "Timeliness is essential to ensure quality field reviews."

<sup>5</sup>Ms. Frances Jane O'Neill, Deputy Director for Housing Development and Chief of the Single Family branch in the Minneapolis-St. Paul HUD office, testified that a "1" rating is reserved for cases of fraud and that an appraiser will be removed from the rolls with an LDP after just one "1" rating. Tr.46-47. However, this testimony is inconsistent with the provisions of Handbook 4150.1 REV-1. Section 9-7 C. 2) provides that "[a]fter three `2 or 1' ratings, the Chief Appraiser must" either institute 30 days of training for the appraiser or remove him from the list of approved appraisers "by LDP or other appropriate means." In other words, Section 9-7 C. 2) of the Handbook appears to contemplate cases where an appraiser may accumulate more than one "1" rating before suffering dismissal. Furthermore, the Appraisal Evaluation Matrix in Handbook 4150.1 REV-1 indicates that an appraisal may earn a "1" rating for a variety of defects less serious than fraud. (This is not to suggest, however, that the Government should not take immediate steps to protect itself from an appraiser found guilty of fraud on just one occasion.)

Chief Appraiser *must* send a copy of the field review to the appraiser after *each* unacceptable rating. It does not say that the Government may store up appraisals for several months, conduct field reviews of all of them at once, and then ambush the appraiser and deprive him of his livelihood if three of the appraisals he has submitted during the period are deemed unacceptable.

The Appraisal Evaluation Matrix referred to in paragraph C. 1) of Section 9-7 of the Handbook provides that an appraisal that falls in category 2 is "UNACCEPTABLE, NEEDS TRAINING" and that an appraisal rated in category 1 is "UNACCEPTABLE, RECOMMEND TERMINATION." HUD's treatment of Respondent in this case fails to take into account the distinction between a "2" rating and a "1" rating. According to the Handbook, additional guidance and training is the proper response to an appraiser who receives a "2" rating, not termination.<sup>6</sup> By storing up appraisals for simultaneous field reviews and then terminating Respondent before he had an opportunity to improve his performance or voluntarily stop accepting assignments, HUD has treated Respondent as though he had submitted category "1" work or had committed fraud. That is both unfair and contrary to HUD's own rules and regulations.

The Government contends that the Handbook notice requirements are not really requirements; rather, they are for "instructional purposes only," and do not "relate to administrative sanction procedures, which are separate." Brief, page 14. That argument turns much of Handbook Section 9-7 C. into meaningless surplusage; it also is internally contradictory. It is inconsistent to rely only upon that part of Handbook 4150.1 REV -1 that authorizes an LDP (undeniably an "administrative sanction procedure") for appraisers who have had three category "2" ratings, while at the same time ignoring or disavowing those parts of the same Handbook that require the Government to provide notice, training and an opportunity to improve before imposing an LDP upon an appraiser who has submitted category "2" work.

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<sup>6</sup>According to Section 9-7 C. 2) in the Handbook, HUD may *either* institute 30 days of training or impose an LDP when faced with an appraiser who has received three category "2" ratings. Even assuming, *arguendo*, that in the proper case a HUD office manager may impose an LDP on such an appraiser without affording prior notice and an opportunity to improve performance, the Government has not explained how the office manager in the Minneapolis-St. Paul office exercised his discretion to decide that Respondent should receive an LDP rather than 30 days of training, a much less severe sanction. The failure to explain the basis for this discretionary decision is itself sufficient reason to overturn the decision.

Handbook 4150.1 REV-1 requires the Government to document each fee appraiser's performance fully by maintaining "[c]opies of all field reviews along with a record of disciplinary meetings, training sessions, and phone calls..." Section 9-7 C. 3). Although Respondent contends he has performed hundreds of appraisals since January of 1986 and although HUD was required to review ten percent of those appraisals, only five field review reports were submitted into the record. In addition to the three reports that form the basis for the LDP, the Government submitted a report dated September 13, 1986, which rated an appraisal in the "poor" category on the previously applicable good-fair-poor scale, and a September 17, 1987, report that concluded that Respondent's appraisal was "fair." Gx.5, 6.<sup>7</sup> There is no evidence in the record showing that HUD at any time conducted disciplinary meetings or training sessions with Respondent because of unacceptable performance, or that HUD made any telephone calls to Respondent concerning his work. The Handbook aptly states, "Without this documentation it is difficult to justify action against a problem fee appraiser." Section 9-7 C. 3). That admonition is well-founded, because HUD has not justified its action against Respondent in the instant case. In other words, the Government has not shown that Respondent was so lacking in "present responsibility" in September of 1990 that he should have been debarred with an LDP.

### **Conclusion and Determination**

Upon consideration of the entire record and the public interest, I conclude and determine that HUD did not have cause to issue a Limited Denial of Participation against Respondent on September 21, 1990, because HUD had not previously notified him of his defective performance and had not afforded him an opportunity to bring his performance up to standard as required by HUD Handbook 4150.1 REV-1.

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THOMAS C. HEINZ  
Administrative Law Judge

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<sup>7</sup>Category "1" and "2" reports under the current rating scheme apparently would fall in the "poor" category under the previous rating scheme. (See Handbook Section 9-5 A. 1.) Respondent misidentified the comparables in the appraisal rated in Gx. 5 by submitting incorrect photographs, the same error made in two of the appraisals at issue here. He nevertheless earned a higher rating, a "fair," in Gx. 5 than in the appraisals that form the basis for the LDP in the instant case. Gx. 5 therefore appears to evidence an evaluation of Respondent's work inconsistent with the evaluations cited by the Government to justify the LDP.